UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

In re:	)	
	)	
GORDON PROPERTIES, LLC, and **CONDOMINIUM SERVICES, INC.**,	)	**Case No. 09-18086-RGM** (Jointly Administered) (Chapter 11)
Debtors.	)	
GORDON PROPERTIES, LLC, and **CONDOMINIUM SERVICES, INC.**,	)	
Debtors,	)	
v.	)	**Contested Matter** (Motion to Approve Settlement, Docket Entry 498)
FIRST OWNERS' ASSOCIATION OF FORTY SIX HUNDRED CONDOMINIUM, INC.,	)	
Creditor.	)	

MEMORANDUM IN SUPPORT OF
MOTION TO RECONSIDER ORDER APPOINTING *AMICUS CURIAE*

Gordon Properties, LLC ("Gordon Properties"), and Condominium Services, Inc. ("CSI") (Gordon Properties and CSI are referred to herein jointly as the "Debtors"), file this Memorandum in Support of Motion to Reconsider Order Appointing *Amicus Curiae* ("Order") as follows:

INTRODUCTION

The Debtors and First Owners' Association of Forty Six Hundred Condominium, Inc. ("FOA") submitted a Joint Motion and Memorandum for Order Approving Settlement between Debtors and FOA ("Settlement Motion") [Docket No. 498]. Both the Debtors and FOA were represented by counsel, and the proposed settlement was the result of court-ordered mediation with the Honorable Kevin R. Huennekens following years of litigation between the parties. The

terms of the settlement were agreed upon following two full-day mediation sessions with Judge Huennekens, and the Settlement Agreement itself was the product of extensive negotiations between the parties and counsel over a period of several weeks following conclusion of the mediation.

In considering the Settlement Motion, the Court *sua sponte* raised a concern about the corporate governance of FOA because "three of the seven directors of FOA are owners or a relative of the owners of Gordon Properties."[1] Order at 4. To resolve this concern, the Court appointed "a disinterested *amicus curiae*," (Order at 4), gave the *amicus* the rights of a party with full discovery and motion rights without limit or further direction (Order at 5), and ordered that the Debtors pay the fees and costs of the *amicus*. *Id.*

The Debtors filed their motion requesting that the Court reconsider its Order, respectfully asserting that the Court does not have the power to appoint an *amicus* to act as fact finder or de facto special master, that even if the Court has such power, the broad unlimited direction is unwarranted, and that there is no authority to require the Debtors to bear the costs of such an extraordinary measure. Accordingly, the Debtors respectfully request that the Court reconsider its Order for the reasons set forth in their motion and for the reasons set forth below.

ARGUMENT

1. THE COURT LACKS THE POWER TO APPOINT AN AMICUS AS SET FORTH IN THE ORDER.

"Traditionally, the role of *amici* has been to act as a friend of the court, providing guidance on questions of law." *Bryant v. Better Business Bureau of Greater Maryland, Inc.*, 923 F. Supp. 720, 727 (D. Md. 1996). This power to appoint an *amicus* derives from a federal court's inherent equitable powers. *James Square Nursing Home, Inc. v. Wing*, 897 F. Supp. 682,

[1] The three individuals are Bryan Sells, Lindsay Wilson, and Elizabeth Greenwell, all of whom are members of Gordon Properties. CSI is wholly-owned by Gordon Properties.

683 n.2 (N.D.N.Y. 1995); *Martinez v. Capital Cities/ABC-WPVI*, 909 F. Supp. 283, 286 (E.D. Pa. 1995).

Because there is no federal rule that applies to *amici*, courts look for guidance to Federal Rule of Appellate Procedure 29 in determining the appropriateness of allowing the participation of *amicus*. *Washington Gas Light Co. v. Prince George's Cnty. Council*, No. 08-0967, 2012 WL 832756, (D. Md. Mar. 9, 2012). *Amici* are less appropriate at the trial level where issues of fact predominate. *Yip v. Pagano*, 606 F. Supp. 728, 1568 (D.N.J. 1985) *aff'd* 782 F.2d 1033 (3d Cir.), *cert denied*, 476 U.S. 1141, 106 S. Ct. 2248, 90 L. Ed. 2d 694 (1986). An *amicus* "is not a party to the litigation and participates only to assist the court." *Waste Management v. York*, 162 F.R.D. 34, 34 (M.D. Pa. 1995). It should not be used with respect to evidentiary claims and should not offer factual information favoring a particular party. *In re Enron Creditors Recovery Corp*., No. 01-16034, 2008 WL 4181708 at *2 (Bankr.S.D.N.Y. Sept. 4, 2008) citing *Banerjee v. Bd. of Trustees of Smith College*, 648 F.2d 61, 65 (1st Cir. 1981) and *Strasser v. Doorley*, 432 F.2d 567 (5th Cir. 1970).

In this case, none of the traditional bases for *amicus* have been identified: "helpful analysis of the law. . . special interest in the subject matter of the suit or existing counsel is in need of assistance." *Bryant*, 720 F. Supp. at 728. To the contrary, the Court appointed an *amicus* and gave it the unfettered broad power of a party to investigate facts as well as law, far beyond the role of an *amicus*. The Court gave this "*amicus*" the role traditionally given to that of a special master. "The appointment and activities of a master are only for the purpose of aiding the trial judge to obtain the facts and arrive at a correct result in a litigation pending before his or her court… ." 9C Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* §2601 (3d ed.1998).

District Courts have the power to appoint masters pursuant to Federal Rule of Civil Procedure 53. However, pursuant to Federal Rule of Bankruptcy Procedure 9031, FRCP 53 does not apply to cases under the Bankruptcy Code. The Advisory Notes provide that "[t]his rule precludes the appointment of masters in cases and proceedings under the Code."

While the Bankruptcy Code gives the Court certain equitable powers under 11 U.S.C. § 105(a) to "issue any order, process or judgment that is necessary or appropriate to carry out the provisions" of the Code, that power cannot be exercised to issue the Order to appoint the *amicus* in this case. "[T]he Supreme Court has made clear that 'whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code.' Thus the equitable powers that a bankruptcy court possesses 'are not a license to . . . disregard the clear language and meaning of the bankruptcy statutes and rules.' *In re Coleman*, 426 F.3d 719, 726 (4th Cir. 2005), citing *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 206 (1988) and *Official Comm. of Equity Sec. Holders v. Mabey*, 832 F.2d 299, 302 (4th Cir. 1987).

The Order, under the guise of the appointment of an *amicus*, in reality, appoints a special master with the power of fact finding, discovery, motions, and the ability to report to the court. Because bankruptcy courts do not have the power to appoint special masters, this Court cannot use its inherent authority to appoint an *amicus* to undertake similar functions.

II. EVEN IF THE COURT HAS THE AUTHORITY TO APPOINT AN AMICUS, THAT AUTHORITY WAS NOT PROPERLY EXERCISED IN THE ORDER.

Even if the Court does have the power to appoint an *amicus*, the appointment at issue exceeds that authority. The appointment of an *amicus* at the trial level to participate as fact finder and over the objection of a party is extremely rare. The vast majority of reported cases addressing *amici* involve whether to grant the request of a non-party to participate in the

proceedings on matters of law. There are few cases where the court on its own initiative appoints an *amicus,* and even fewer that involve fact finding.

Such an appointment, particularly at the trial level, should be a rare instance. *See Tennessee v. Medicine Bird Black Bear White Eagle*, 63 S.W.3d 734, 758-59 (Tenn. 2001). "[A] district court lacking joint consent of the parties should go slow in accepting, and even slower in inviting, an *amicus*" and "an *amicus* who argues facts should rarely be welcomed." *Strasser v. Doorely*, 432 F.2d 567 (5th Cir. 1970). Here, the Court has appointed an *amicus*, given that *amicus* the rights of a party in a contested matter, and provided no limits, guidance, or restrictions. Even if this is not considered a special master, the breadth of the appointment is beyond the scope of what might be considered appropriate for a court-appointed *amicus*.

The proper role of an *amicus* to assist the court is for (1) providing adversarial presentations when neither side is represented, (2) providing an adversarial presentation when only one point of view is represented, (3) supplementing the efforts of counsel even when both sides are represented, and (4) drawing the court's attention to the broader legal or policy implications that might otherwise escape the court's consideration. *Giammolvo v. Sunshine Mining Co*., 644 A.2d 407, 409 (Del. 1994). None of these factors were cited by the Court in appointing the *amicus* in this case.

To the contrary, the Court acknowledged that the parties have engaged in "more than six years of litigation" which has proved costly to the parties. Order at 1. The Court further acknowledges that the parties were adequately represented and that the settlement was the result of court-ordered meditation. Order at 2. The sole basis expressed for the need of the *amicus* is that one of the parties to the settlement, FOA, has a *minority* of overlapping directors with Gordon Properties. Nonetheless, a majority of FOA's board has no such possible conflict when

approving the Settlement Agreement that arose from the court ordered mediation. Clearly, that majority of FOA's board, and FOA's counsel, had full resort to the rights of a party in an adversary proceeding, including all the rights given to the *amicus* by the Order. To the extent FOA's board wanted to "take discovery, to file motions and pleadings, to respond to any pleading filed, to call witnesses to examine and cross examine witnesses and to address the court," it clearly has that right in this case. Extending these rights to an *amicus* is tantamount to making that *amicus* a party, an impermissible role for any *amicus*.

Courts set a "bright line test between an *amicus* and a named party." *Waste Management of Penn. v. York*, 162 F.R.D. 34, 34 (M.D. Pa. 1995). The named parties should always remain in control, with the *amicus* merely responding to the issues presented by the parties. An *amicus* cannot initiate, create, extend, or enlarge issues." *Wyatt by and through Rawlins v. Hanan*, 868 F. Supp. 1356, 1358 (M.D. Ala. 1994). *Accord, Tafas v. Dudas*, 511 F. Supp. 2d 652, 660 (E.D. Va. 2007)("The Court agrees that it may not consider legal issues or arguments not raised by the parties," citing *Cellnet Commc'ns. v. F.C.C.*, 149 F.3d 429, 443 (6th Cir. 1998), holding that "to the extent the *amicus* raises issues or make arguments that exceed those properly raised by the parties, [the Court may not consider such issues]"). Thus, this Court has no authority to give the *amicus* rights superior to the rights exercised by the parties, or to raise issues of fact or law not already raised by the parties.[2]

The Debtors could find no reported case where the court's appointment of an *amicus* afforded an *amicus* all the rights of a party, including discovery and motions. The Debtors

[2] Even in cases where a Court grants a motion to permit an *amicus* to participate in the proceeding above traditional amicus rights or "*amicus* plus" status, those *amici* are not given the rights of a party and cannot raise new issues not raised by the parties. *Liberty Resources, Inc., Philadelphia Hous. Auth.*, 395 F. Supp. 2d 206, 210 (E.D. Pa 2005). And notably, those *amicus* who request to participate by motion pay their own fees. *See infra*.

respectfully submit that this is because the broad appointment set forth in the Order is simply impermissible. The settled case law regarding the appointment of *amicus* by the court (as opposed to approving a request to file an *amicus* brief) is that *amicus* at the trial level is rare; it should only be done when a "helpful analysis of the law. . . special interest in the subject matter of the suit or existing counsel is in need of assistance." *Bryant*, 720 F. Supp. at 728. The Court did not rely upon any of these bases in its appointment.

It is apparent from the Order that the Court was concerned about corporate governance issues of FOA. Specifically, the Court appeared to be concerned about the overlapping identity of the members of Gordon Properties and FOA's board. In addition, the Court appeared to be concerned about the appointment of the Special Litigation Committee ("SLC") and its authority to enter into and approve the settlement agreement.[3] The Debtors are confident that the Court's concerns would have been resolved during the evidentiary phase of the hearing on approval of the Settlement Agreement. The Court should know that counsel for both the Debtors and FOA had already discussed the need to create such an evidentiary record. That evidence will establish that FOA's board voted unanimously (6-0, with 1 absent) to approve the settlement agreement that had been negotiated, drafted, and approved by the SLC, and would have established that all non-interested members voted in favor of the proposed settlement.[4] Similarly, the evidence will

[3] This concern appears to arise as a result of the allegations made by the plaintiffs in *Sobol, et al v. Sells, et al*, A/P No. 12-1562-RGM, which allegations have been denied by both the FOA and the individual defendants.

[4] Although the Court has identified the three individuals who are related to Gordon Properties as being interested members of FOA's board, it cannot be forgotten that another member of FOA's board is equally interested on the other side of the dispute. Lucia Hadley was a member of the board that engaged in the wrongful conduct resulting in Gordon Properties' judgment against FOA and is a defendant in a breach of fiduciary suit filed by FOA against those board members. Notwithstanding that Ms. Hadley is the board member who was absent from the meeting at which the settlement agreement was approved and might have voted in opposition, because Ms. Hadley is not disinterested, the actual vote of the "disinterested" board members was 3-0.

address any concern the Court might have had with respect to the formation and authority of the SLC. As a threshold, the evidence will establish that the SLC had been properly appointed in the first instance. Moreover, the evidence will establish that the SLC voted unanimously (3-0) to approve the settlement agreement. More importantly, the evidence will establish that FOA's board voted unanimously (7-0) at a recent meeting to ratify the earlier appointment of the SLC and its approval of the settlement agreement.[5] Thus, the Debtors submit that the normal adversarial process and evidentiary record would have addressed any concerns of the Court regarding the binding nature of the settlement agreement as to FOA and would have eliminated any need for an *amicus* with the unfettered power of a party to litigate these issues.

III. EVEN IF THE APPOINTMENT OF THE AMICUS IN THE ORDER IS APPROPRIATE, THE COURT SHOULD PROVIDE GUIDANCE AND DIRECTION OF WHAT INFORMATION WOULD AID THE COURT IN BEING ABLE TO RULE ON THE MOTION FOR SETTLEMENT.

At a minimum, the Court should provide guidance to the *amicus* as to the exact information that would be helpful to the Court in approving the Settlement Agreement. An unfettered designation giving the *amicus* the rights of a party with full discovery power can only result in re-litigation of the issues in the case, which will be costly and of no help to anyone. Indeed, one of the hallmarks of a settlement is to bring an end to litigation. The Court's Order is contrary to that intent, and, candidly, is likely to have an impact on the parties' willingness to consummate the Settlement.

If the issue is strictly the issue of corporate governance, as suggested in the Order, then the Court should articulate the facts and law that it needs to resolve that issue. On the other

[5] Notwithstanding that the parties believe the Court would conclude that the original appointment of the SLC following the 2012 election satisfied all applicable legal requirements, in light of the allegations contained in the *Sobol* complaint, FOA's board acted prophylactically to ratify the appointment and the actions of the SLC with respect to the settlement agreement in order to remove any doubt.

hand, if the issue is broader, for example, the fairness of the settlement,[6] then the Debtors submit there is simply no authority to delegate the Court's role in approving a settlement. More importantly, for the same reasons that the Court is required by applicable case law to defer to the business judgment of the Debtors in entering into the settlement, the Court also should defer to the business judgment of FOA.

IV. THE COURT HAS NO AUTHORITY TO IMPOSE THE COSTS AND FEES OF THE AMICUS ON THE DEBTORS.

The law is clear that, in order to impose the fees of *amici curiae* on a party, *amicus* must render services which prove beneficial to the Court AND the party charged with the fees must have created the necessity for the services to be provided. *Morales v. Turman*, 820 F.2d 728, 731 (5th Cir. 1987). Here, the Court imposes the costs on the Debtors. This is impermissible.

The American rule requires each party to bear its own attorney fees absent contrary contractual or statutory provisions. Exceptions are narrowly circumscribed. *United States v. Standard Oil Co. of California,* 603 F.2d 100, 103 (9th Cir. 1979). Traditional *amicus* who petition a court for permission to submit amicus briefs are acting out of the interests of the client that employs them to seek the *amicus* and are paid by those parties. Here, the only exception that might permit the shifting of fees is where the need for the *amicus* is caused by a party.

> **The traditional rule regarding compensation of an *amicus curiae* is that "where the court appoints an *amicus curiae* who renders services which prove beneficial to a solution of the questions presented, the court may properly award him compensation and direct it to be paid by the party responsible for the situation that prompted the court to make the appointment."**

[6] As suggested by the Court's citations to *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 88 S. Ct. 1157 (1968) and *In re Merry-Go-Round Enterprises, Inc*., 229 B.R. 337, 347 (Bankr. D. Md. 1999).

Schneider v. Lockheed Aircraft Corp, 658 F.2d 835, 853 (D.C. Cir. 1981) *cert denied*, 455 U.S. 994, 102 S. Ct. 1622, 71 L. Ed. 2d. 855 (1982).

In *Schnieder*, despite the "complexity and unwieldiness of the questions confronting the court at the time the *amicus* was appointed," the appellate court reversed the taxing of *amicus* fees against Lockheed as being contrary to clear legal precedent. Lockheed was the defendant and had been sued on multiple tort grounds as a result of an airplane crash which killed many children and orphans being airlifted to the United States in the waning days of the Vietnam war. According to that Court, the *amicus* provided invaluable assistance. However, the need for the *amicus* was not the result of any conduct Lockheed took in the proceedings and thus, it had been error to assess these additional fees and costs against Lockheed. Being the defendant and liable for the underlying claim was not sufficient.

Similarly, in this case, the Debtors have not caused a need for the appointment of the *amicus*. The sole issue raised by the Court in the Order is the issue of the corporate governance of FOA. If FOA cannot satisfy the Court on its corporate governance issue, it is not the Debtors' fault that necessitates the appointment of the *amicus*.

CONCLUSION

Debtors respectfully submit that the Court lacks the authority to appoint an *amicus* in the broad, unfettered fashion set forth in the Order and requests that the Court reconsider 1) the appointment of the *amicus*, 2) the scope of the *amicus* functions, and 3) the taxing of the costs of the *amicus* on the Debtors.

WHEREFORE, Gordon Properties, LLC, and Condominium Services, Inc., in consideration of the foregoing, request that the Court grant its Motion to Reconsider Order Appointing *Amicus Curiae*, and for any other relief the Court deems proper.

Respectfully submitted,

GORDON PROPERTIES, LLC,
CONDOMINIUM SERVICES, INC.
By counsel

By: **/s/*Donald F. King***

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